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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA

AND

JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., AND BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a civil RICO cause of action accrues when the plaintiff knows or should know that she has been injured – even though she does not know that her injury was caused *by the defendants* – or only when she knows or should know that her injury was caused by the defendants and is part of a pattern of racketeering activity.

2. Whether a cause of action accrues under RICO before the amount of damages, if any, becomes clear and where the injured party may still be made whole by an ongoing bankruptcy proceeding or other suit for damages in another forum.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a-25a) is reported at 75 F.3d 506. The opinion of the United States District Court for the District of Nevada dismissing the complaint (App., *infra*, 26a-34a) is unreported. The opinion of the district court denying petitioners' motion for reconsideration (App., *infra*, 35a-43a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Except as noted, the following statement of facts is taken largely verbatim from the opinion of the court of appeals (App., *infra*, 3a-5a).

1. Vincent and Joanne Siragusa divorced in 1983. At that time, Vincent owned a one-third interest in a cardiology practice called the Heart Institute of Nevada ("HIN"); Drs. Paul Heeren and John Bowers held the remainder equally.[1] As part of the divorce, Joanne agreed

[1] This was not the only organization in which Vincent owned a share. He also owned 33% in the Heart Institute Cath Lab ("HICL") and 27.55% in the Heart Institute Property ("HIP"). These organizations are collectively known as "the medical practices."

to release her one-half community property interest in Vincent's ownership share in the medical practices in exchange for monthly payments. Joanne perfected a security interest in the practices to protect her in the event that Vincent defaulted. When Vincent defaulted in 1987, Joanne secured a state court judgment for the full amount of her interest. Before she could collect her judgment, however, Vincent filed for bankruptcy and claimed that he no longer owned his interest in the practices.

In May 1989, Joanne and Vincent's bankruptcy trustee, Tom Grimmett, filed an adversary complaint in bankruptcy court alleging that Vincent, Dr. Bowers, and Dr. Heeren had conspired to cheat Joanne out of her share in Vincent's interest in the practices.[2] Vincent had claimed that he was forced to sell his interest in the medical practices at a loss and become a mere employee when the practices were reorganized into the Cardiology Associates of Nevada ("CAN"). Joanne alleged that because of secret side agreements, Vincent continued to make as much money as he did before and retained a "sub rosa" interest in the medical practices; to her, the reorganization amounted to a "common plan to defraud

[2] Contrary to the statement of facts in the Ninth Circuit's opinion, the adversary complaint in bankruptcy court clearly did *not* allege that HIN's attorney, Patricia Brown, was involved in the conspiracy to cheat Joanne. Brown's involvement in the conspiracy was not known to petitioners until December 1990 when Dr. Heeren disclosed her role. Until that time, petitioners indulged the reasonable assumption that HIN's attorney was not culpably involved in her client's wrongdoing. Brown and Beckley were added as defendants in the bankruptcy complaint in July 1991.

[her] out of her rights under the Divorce Instruments." The alleged scheme also involved the use of backdated documents and false representations to the bankruptcy court.

In December 1990, Dr. Heeren told Joanne that he, too, had been defrauded by the reorganization scheme. Although Dr. Heeren was also supposed to have received the same share of profits under the side agreements, he had not. Dr. Bowers had used the reorganization scheme not only to cheat Joanne but also to cheat Dr. Heeren and to take control of the medical practices. It was also in 1990 that Dr. Heeren first told Joanne that Patricia Brown (and her law firm, Beckley, Singleton, Delanoy, Jemison & List) had masterminded the scheme.

From April 1991 to November 1991, Dr. Bowers sold 49% of CAN's stock ownership to CAN's doctor-employees. At that time, Dr. Bowers and Brown falsely assured the junior stock-holders that Joanne's 1989 bankruptcy complaint exposed CAN to at most $250,000 in liability. They did not tell the junior stockholders that Joanne also sought to undo the reorganization.[3]

2. In November 1994, Joanne and Grimmett filed a civil RICO action in federal court. They alleged a pattern of racketeering activity having four goals: (1) to acquire and maintain Vincent's medical practice interest by fraud; (2) to acquire and maintain Dr. Heeren's medical practice

[3] In 1992, when Dr. Bowers settled out of court with petitioners, CAN was required to pay substantially all of the $1.4 million settlement payment. Because he settled, Dr. Bowers is not a party in this case.

interest by fraud; (3) to defraud the CAN junior stockholders; and (4) to obstruct justice. They claimed that Brown masterminded the entire scheme.

Brown and her law firm ("Beckley") moved to dismiss the RICO suit as barred by the four-year statute of limitations, claiming that Joanne Siragusa knew of the injury to her interest in Vincent's medical practice in May 1989 (when Joanne filed the bankruptcy court complaint). Brown and Beckley sought to invoke the "injury discovery" rule, under which a civil RICO cause of action accrues once the injury is reasonably apparent.

In response, Joanne and Grimmett argued that although they were aware of Joanne's injury by May 1989, they were not aware that Brown was one of the persons who had caused her injury. They contended that even under the injury discovery rule a cause of action does not accrue until the plaintiff discovers not only that she was injured but also *who caused* her injury. Petitioners also argued that a civil RICO plaintiff's claims do not accrue until she discovers that her injury was part of a pattern of racketeering activity. It was undisputed that under the "pattern discovery" accrual rule followed by several circuits, petitioners' RICO claims did not accrue until at least December 1990, when Dr. Heeren revealed the full scope of the fraudulent reorganization scheme and the fact that he too was victimized by it. Until that time there was clearly no basis for alleging a pattern of racketeering activity (or for charging *respondents* with any wrongdoing).

Petitioners also argued that the doctrine of equitable tolling should apply to delay accrual of the statute of

limitations period because of the closely related action between the same parties in the bankruptcy court, which was still pending there; and that because Brown actively concealed her wrongdoing from petitioners, the doctrine of fraudulent concealment should also toll the running of the limitations period.

3. The district court dismissed the complaint. The court "recognize[d] that when plaintiffs filed their Adversary Proceeding complaint, they may not have been aware, as they allege now, that defendant Brown was involved in any allegedly fraudulent activity. Nevertheless, the rule in this Circuit focuses on when a plaintiff knew or should have known of his injury, and not when that plaintiff knew or should have known that a particular person caused that injury." App., *infra*, 32a. The district court failed to address petitioners' arguments in support of the "pattern discovery" accrual rule, except to note that that was not the accrual rule followed in the Ninth Circuit. The court also did not address petitioners' two equitable tolling arguments.

Petitioners expanded on their argument that the running of the limitations period should be equitably tolled because of the related bankruptcy proceeding in a motion for reconsideration. Petitioners relied upon a line of cases beginning with *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989), which hold that a RICO action does not accrue before the amount of damages, if any, becomes clear and definite. These cases reason that where the injured party may still be made whole by an ongoing bankruptcy proceeding or state court civil suit, the time period for bringing a federal RICO action does not begin to run because there may

ultimately not be any damages. Petitioners contended that because they could still be made whole by the bankruptcy court, the time for bringing a civil RICO action had not yet even begun to run. The district court denied the motion for reconsideration, finding the *Bankers Trust* line of cases unpersuasive. App., *infra*, 35a-45a.

4. The court of appeals affirmed, rejecting each of petitioners' alternative limitations arguments. App., *infra*, 1a-25a.[4] The panel thought that petitioners' criticisms of the "injury discovery" rule were not "persuasive enough to warrant abandonment" of that rule in favor of the "pattern discovery" rule. *Id.* at 12a.[5] The court also rejected petitioners' argument that the statute of limitations had not begun to run because of the possibility they would be made whole in the then ongoing bankruptcy proceeding. The court acknowledged (*id.* at 23a-24a) that if the *Bankers Trust* line of cases were the law in the Ninth Circuit petitioners would prevail. However, the court flatly disagreed with that line of authority. *Id.* at 22a-25a.

The court also rejected petitioners' argument that the limitations period should be equitably tolled by Brown's fraudulent concealment of the bankruptcy scheme and

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[4] The court of appeals ignored petitioners' contention that even under the least generous accrual rule (the "injury discovery" rule followed by the Ninth Circuit), a plaintiff must discover not merely the fact that she has been injured but also who is responsible for that injury. *United States v. Kubrick*, 444 U.S. 111, 122 (1979).

[5] At oral argument, Judge Hall, who wrote the opinion, stated her view that the panel could not adopt the "pattern discovery" rule because only an *en banc* court may overrule circuit precedent.

her role in it. The court held that petitioners never pled the allegedly concealed facts in their complaint and had failed to show Brown's *active* concealment of the reorganization scheme. At most, said the court, Brown failed to "own up" to her illegal conduct. *Id.* at 18a. Although this is a serious distortion of the record, which is loaded with allegations and proof that Brown actively concealed the reorganization scheme,[6] petitioners do not seek review of this issue because it is fact-bound.

REASONS FOR GRANTING THE PETITION

A. This Is An Appropriate Case For Resolving A Long-standing Conflict Among The Circuits On When A Civil RICO Cause Of Action Accrues.

This is an appropriate case for resolving a longstanding and serious conflict in the circuits on the question of when a civil RICO cause of action accrues. The court of appeals observed that, in the absence of guidance from this Court, the circuits have fashioned "no less than three

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[6] As stated in Joanne Siragusa's Reply Brief in the Ninth Circuit at 9-10, Brown committed perjury in depositions on April 9, 1990, November 14, 1990 and November 27, 1990 when she testified that she was not involved in planning or implementing Vincent Siragusa's fraudulent bankruptcy. She also perjured herself in her depositions on November 14, 27 and 28 when she testified that she had not represented Vincent in his divorce or been involved in his divorce proceedings. This perjury, which is detailed in the RICO complaint primarily at Exhibit 4, pages 11-12, hindered petitioners in discovering Brown's criminal role in the bankruptcy and reorganization schemes.

distinct accrual rules for civil RICO claims." App., *infra*, 7a.[7] According to the Ninth Circuit, the circuits are about equally divided between those following the "injury discovery" rule, according to which the limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action,[8] and those following the "pattern discovery" rule, which does not start the statute of limitations clock until the plaintiff discovers or is in a position to discover the existence of a pattern of racketeering activity in addition to the existence and source of his injury.[9]

The Third Circuit follows the "last predicate act" rule, which is the most favorable to plaintiffs. That rule operates like the pattern discovery rule except that the accrual period runs from the time when the plaintiff knew or should have known of the *last injury or last*

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[7] In a recent RICO decision, the Second Circuit identified "a split among the circuits generating as many as half a dozen conflicting accrual rules." *Bingham v. Zolt*, 66 F.3d 553, 559 (2d Cir. 1995), *petitions for cert. pending*, Nos. 95-1245 and 95-1276.

[8] *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-68 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *La Porte Constr. Co. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992).

[9] *Caprioni v. Prudential Securities, Inc.*, 15 F.3d 614, 619 (6th Cir. 1994); *Bath v. Buskhin, Gaims, Gaines & Jonas*, 913 F.2d 817 (10th Cir. 1990); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991); *Granite Falls Bank v. Henrickson*, 924 F.2d 150, 154 (8th Cir. 1991).

predicate act which is part of the same pattern of racketeering activity. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-31 (3d Cir. 1988).

These conflicting accrual rules make an enormous difference in the amount of time a potential RICO plaintiff has to investigate and bring a civil RICO claim – a difference that is frequently outcome dispositive, as in this case. The better reasoned decisions have adopted the pattern discovery rule. These courts recognize that a pattern discovery rule is necessary because a plaintiff often suffers injuries from one or more RICO predicate acts and yet does not have sufficient facts upon which to base a claim that a defendant conducted an enterprise through a pattern of racketeering activity.

Perhaps because of the greater stringency of the critical "continuity" prong of the pattern element after *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), it became evident to many courts that the traditional injury discovery rule did not make sense in the civil RICO context. In cases involving a "closed-ended" scheme, the courts have generally held that the minimum duration necessary to satisfy the continuity requirement is over a year. *See Religious Tech. Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) (court could find no case in which continuity requirement was held to be satisfied by a pattern of racketeering activity lasting less than a year). By the time a true pattern of racketeering activity could be discovered, much or all of the four year limitations period would have already run, leaving potential plaintiffs with insufficient time to investigate the typically complex facts involved in a RICO case and prepare

a complaint. *Keystone Ins. Co. v. Houghton*, 863 F.2d at 1130.

Accordingly, the courts have increasingly recognized that the four year statute of limitations established in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987) would be vitiated by the application of the normal federal accrual rule based on the discovery of plaintiff's injury. *Keystone Ins. Co. v. Houghton*, 863 F.2d at 1134; *Granite Falls Bank v. Henrikson*, 924 F.2d at 154. Moreover, "[i]n selecting a term of ten years within which predicate acts could occur to establish the pattern requirements, Congress must have contemplated recovery for remote acts and even for remote injuries." *Ibid.*; *Keystone Ins. Co. v. Houghton*, 863 F.2d at 1132-33. The pattern discovery accrual rule is also the only rule consistent with the broad remedial purposes of civil RICO. *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d at 1555; *Keystone Ins. Co. v. Houghton*, 863 F.2d at 1128-29. *See also, Mother of Mercy, Is This The Beginning of RICO?: The Proper Point of Accrual Of A Private Civil RICO Action*, 65 N.Y.U.L. Rev. 172, 205 (1990).

Here, petitioners could not have had knowledge that the injury they suffered was part of a pattern of racketeering activity until December 1990 at the earliest, when Dr. Heeren came forward with the truth of Brown's involvement and revealed that he too had been a victim of a separate but related scheme to fraudulently acquire his medical practice interest.[10] Accordingly, if petitioners

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[10] Petitioners reiterate that until Dr. Heeren's revelation, they did not even know that Brown was culpably involved in the fraudulent reorganization scheme. Thus, they had no basis for suing her or Beckley until that time, quite apart from the need to allege a pattern of racketeering activity.

had initiated a RICO action prior to the discovery of this pattern, they would have been subject to dismissal and possibly sanctions.

Apart from the incorrect decision in this case, the only two Circuits that have, in recent years, declined to adopt a pattern discovery accrual rule are the First and the Seventh. *However, both of those circuits have implicitly acknowledged the force of the arguments in favor of a pattern discovery accrual rule by allowing the RICO limitations period to be equitably tolled during the time that a victim reasonably fails to discover the RICO pattern. Rodriguez v. Banco Corp.*, 917 F.2d 664, 667-68 (1st Cir. 1990); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992). Thus, the difference between the positions of the First and Seventh Circuits on the one hand, and the Third, Sixth, Eighth, Tenth and Eleventh Circuits on the other, may be more theoretical than real.[11]

The Ninth Circuit apparently agreed with that approach when it observed (App., *infra*, 11a) that "a court wishing to give a plaintiff who knows of her injury time

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[11] It is unclear whether the Fourth and Fifth Circuits would still follow the "injury discovery" rule. The precedents in those circuits are ten years old and therefore pre-date this Court's decisions in *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987) and *H.J. Inc.* and the adoption of a pattern discovery rule by other circuits. More recently, a district court within the Fifth Circuit adopted the Third Circuit's "last predicate act" rule. *Crowe v. Smith*, 856 F.Supp. 1178, 1181-85 (W.D. La. 1994).

to investigate the pattern can always toll the limitations period," citing *McCool*, 972 F.2d at 1465. Inexplicably, however, the Ninth Circuit did not remand the case to the district court with a direction to consider whether the limitations period should be tolled; nor did the court suggest any reason why the limitations period should not be tolled in this case.

In other respects as well, the Ninth Circuit panel's defense of the "injury discovery" rule is weak and even incoherent. After settling forth petitioners' basic argument in favor of the pattern discovery rule, the court acknowledges that their "exposition of the law is correct." *Id.* at 12a. However, the court then purports to refute petitioners' argument with the following statement (*ibid.*):

> Because a RICO cause of action cannot accrue until all the elements exist, *see McCool*, 972 F.2d at 1465, no statute of limitations can begin to tick until a pattern exists, which will not be until continuity exists and the one year usually required to establish continuity has already lapsed. Because this one-year delay impacts both rules equally, it favors neither.

We have read this critical passage many times but its meaning is still not clear to us. Our best guess is that the court is drawing a distinction between the *existence* of a pattern of racketeering activity and the plaintiff's *discovery* of that pattern. The court seems to be saying that even under its interpretation of the injury discovery rule "no statute of limitations can begin to tick until a pattern exists" (*ibid.*). The only difference between the two rules, then, is that under the Ninth Circuit's rule the clock

begins to tick as soon as a pattern actually exists (even if its existence could not be discovered by the plaintiff until much later), whereas under the "pattern discovery" rule the limitations period does not commence until the plaintiff discovers or should have discovered the existence of the pattern of racketeering activity.

If that is what the Ninth Circuit means, its position makes no sense. Why should the limitations period begin to run as soon as a pattern *exists* if the plaintiff had no means to *discover* that it existed? No other court has suggested that under the "injury discovery" rule the clock does not begin to run until a pattern of racketeering activity exists; thus, the Ninth Circuit's apparent position is *sui generis*. Moreover, the court fails to explain why a remand is not necessary to determine when a pattern of racketeering activity came into existence in the case at bar. The district court never made such a finding because it believed that under the injury discovery rule the clock begins to run when a plaintiff discovers her injury, regardless of when a pattern existed. Indeed, the parties never argued the mixed factual and legal question of when a pattern of racketeering activity first existed (as opposed to when petitioners discovered its existence) because they did not believe it to be relevant.

B. The Ninth Circuit Also Rejected The Well-Reasoned Position Of Three Other Circuits That A Cause Of Action Does Not Accrue Under RICO Before The Amount Of Damages, If Any, Becomes Clear, Where The Injured Party May Still Be Made Whole By An Ongoing Damage Suit In Another Forum.

If the foregoing RICO accrual issue was the only one in the case, there would be reason enough to grant

review. But there is another important accrual issue in the case, which the Ninth Circuit also decided incorrectly. The Ninth Circuit acknowledged that the First, Second and Seventh Circuits have held that a RICO plaintiff's cause of action does not accrue while she is pursuing a single damage remedy in another forum that may yet make her whole. App., *infra*, 22a-23a , citing *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105-06 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) (plaintiff's RICO cause of action had not yet accrued where, at time of RICO suit, it was still attempting to regain some of the defendant's fraudulently concealed assets in an ongoing bankruptcy proceeding so that the amount of plaintiff's damages, if any, remained speculative); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1165 (2d Cir.), *cert. denied*, 114 S.Ct. 385 (1993) (RICO claim had not accrued for a plaintiff who, because he had not collected on judgments awarded in earlier state proceedings, did not know the amount of his damages); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 728 (1995) ("[A]s a general rule, a cause of action does not accrue under RICO until the amount of damages becomes clear and definite."); *Barnett v. Stern*, 909 F.2d 973, 977 n.4 (7th Cir. 1990) (adopting *Bankers Trust* rule on similar facts); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847-48 (1st Cir. 1990) (adopting *Bankers Trust* rule for RICO claim where plaintiff has yet to win or collect judgment on state court action for his injury).

The reason for that rule is obvious: if a potential plaintiff is made whole by means of a bankruptcy action or state court judgment she would then have suffered no damages. So long as the existence of damages remains

speculative, a cause of action should not accrue. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971).

The Ninth Circuit, like the district court, recognized that this case has facts virtually identical to *Bankers Trust*. However, like the district court, it chose to reject the *Bankers Trust* rule. Here again, the court justified its decision largely on the basis of prior Ninth Circuit precedent. The court did not criticize the *Bankers Trust* rule on policy grounds. It merely said that the rule was not compelled by this Court's decision in *Zenith*, *supra*, because *Zenith* dealt with lost future profits which could not yet be calculated.

> In *Bankers Trust*, however, the RICO plaintiff had sustained a definable injury – the uncertainty in that case involved whether and to what extent the known injury would be mitigated by a bankruptcy court. In one, the injury is speculative because it is not known whether it will occur at all; in the other, the injury has occurred and is known, but it is speculative whether the damages might be reduced *or even eliminated* by alternative recovery efforts. We believe it would be error to equate the two.

Id. at 24a (emphasis supplied). While petitioners would concede that the *Bankers Trust* rule is not compelled by this Court's decision in *Zenith*, neither is it precluded by *Zenith* or any other decision of the Court. The Ninth Circuit apparently saw no need to justify its rejection of the *Bankers Trust* rule – a rule followed by three circuits and heretofore rejected by none – because it deemed itself bound by prior Ninth Circuit precedent. However, the

Ninth Circuit cases it relied on did not even address this precise issue.

Petitioners urged the Ninth Circuit not to adopt a rule contrary to *Bankers Trust* that would force defrauded creditors and bankruptcy trustees to resort to treble damage RICO suits in federal court at the earliest possible time instead of encouraging them to first seek a more limited and less complicated single damage remedy in bankruptcy or state court. Petitioners argued that there was nothing to be gained by forcing plaintiffs to prematurely escalate their litigation posture into a RICO suit and much to be lost, including a good measure of judicial economy. We submit that the Ninth Circuit failed to address these arguments because there is no sound reason for rejecting the *Bankers Trust* line of cases.

The RICO accrual issues in this case are ripe for review. This case offers the Court an opportunity to resolve at one time the two most important civil RICO accrual issues that have divided the circuits. The Court's resolution of these issues may also significantly affect non-RICO cases. In particular, the Court could decide whether a cause of action may accrue even before a plaintiff discovers who caused her injury, as the Ninth Circuit holds, *Gibson v. United States*, 781 F.2d 1334, 1344 (9th Cir. 1986); App., *infra*, 31a-32a, or whether, as this Court stated in *United States v. Kubrick*, 444 U.S. 111, 122 (1979), a plaintiff must be in "possession of the critical facts that he has been hurt *and who has inflicted the injury*" before the cause of action arises. *Accord Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d at 1554-55 ("a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should

have discovered, both the existence *and source* of his injury and that the injury is part of a pattern.") (emphasis added). A ruling for petitioners on that broader issue would provide an alternative ground for reversing the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1996

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOM GRIMMETT, As Trustee for the Bankruptcy Estate of Vincent Siragusa,

Plaintiff,

and

JOANNE SIRAGUSA,

Plaintiff-Appellant,

v.

PATRICIA L. BROWN; PATRICIA L. BROWN, LTD., A Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHARTERED, A Nevada Corporation,

Defendants-Appellees.

No. 94-16137

D.C. No. CV-93-01155-PMP

TOM GRIMMETT, As Trustee for the Bankruptcy Estate of Vincent Siragusa,

Plaintiff-Appellant,

v.

PATRICIA L. BROWN; PATRICIA L. BROWN, LTD., A Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHARTERED, A Nevada Corporation,

Defendants-Appellees.

No. 94-16214

D.C. No. CV-93-01155-PMP

OPINION

Appeals from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
December 6, 1995 – San Francisco, California

Filed January 26, 1996

Before: James R. Browning, William C. Canby, Jr., and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Hall

COUNSEL

David B. Smith, English & Smith, Alexandria, Virginia, and Randall M. Rumph, Shinehouse & Duesing, Law Vegas, Nevada, for plaintiff-appellant Siragusa.

Erven T. Nelson, Alverson, Taylor, Mortensen & Nelson, Las Vegas, Nevada, for plaintiff-appellant Grimmett.

Don F. Shreve, Jr., and Peter Angulo, Rawlings, Olson & Cannon, Las Vegas, Nevada, for defendants-appellees Brown.

George W. Foley, Jr., Pearson and Patton, Las Vegas, Nevada, for defendant-appellee Beckley, Singleton.

OPINION

HALL, Circuit Judge:

Joanne Siragusa and Tom Grimmett, the bankruptcy trustee of Joanne's ex-husband Vincent's estate, appeal the district court's dismissal of their civil RICO suit. In their November 1994 suit, Joanne and Grimmett alleged

that defendant Patricia Brown masterminded the reorganization of Vincent's medical practices so as to cheat Joanne out of her post-divorce community property interest in those practices. The district court found their suit barred by RICO's four-year statute of limitations. On appeal, Joanne and Grimmett argue: (1) that the district court applied the wrong accrual rule to their RICO cause of action; (2) that it wrongly concluded that their post-November 1990 injuries did not trigger the "separate accrual rule;" (3) that it failed to address whether their RICO cause of action was tolled by Brown's fraudulent concealment; and (4) that it wrongly held that the pendency of the bankruptcy proceeding did not toll the statute or prevent the RICO cause of action from accruing.

The district court had jurisdiction over the RICO claim under 18 U.S.C. § 1964(c). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I.

Vincent and Joanne Siragusa divorced in 1983. At that time, Vincent owned a one-third interest in a cardiology practice called the Heart Institute of Nevada ("HIN"); Drs. Paul Hareen and John Bowers held the remainder equally.[1] As part of the divorce, Joanne agreed to release her one-half community property interest in Vincent's ownership share in the medical practices in

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[1] This was not the only organization in which Vincent owned a share. He also owned 33% in the Heart Institute Cath Lab ("HICL") and 27.55% in the Heart Institute Property ("HIP"). These organizations are collectively known as "the medical practices."

exchange for monthly payments. Joanne perfected a security interest in the practices to protect her in the event that Vincent defaulted. When Vincent defaulted in 1987, Joanne secured a state court judgment for the full amount of her interest. Before she could collect her judgment, however, Vincent filed for bankruptcy and claimed that he no longer owned his interest in the practices.

In May 1989, Joanne and Vincent's bankruptcy trustee, Tom Grimmett, filed an adversary complaint in bankruptcy court alleging that Vincent, Dr. Bowers, Dr. Hareen, and HIN's attorney, Patricia Brown, had conspired to cheat Joanne out of her share in Vincent's interest in the practices. Vincent had claimed that he was forced to sell his interest in the medical practices at a loss and become a mere employee when the practices were reorganized into the Cardiology Associates of Nevada ("CAN"). Joanne alleged that because of secret side agreements, Vincent continued to make as much money as he did before; to her, the reorganization amounted to a "common plan to defraud [her] out of her rights under the Divorce Instruments." The alleged scheme also involved the use of backdated documents and false representations to the bankruptcy court.

In December 1990, Dr. Hareen told Joanne that he, too, had been defrauded by the reorganization scheme. Although Dr. Hareen was supposed to have received a share of profits under the side agreements, he had not. It was also in 1990 that Dr. Hareen first told Joanne that Patricia Brown (and her law firm, Beckley, Singleton, Delanoy, Jemison & List) had masterminded the scheme.

From April 1991 to November 1991, Dr. Bowers sold 37.5% of CAN's stock ownership to CAN's doctor-employees. At that time, Dr. Bowers assured the junior stockholders that Joanne's 1989 bankruptcy complaint exposed CAN to at most $250,000 in liability. Dr. Bowers did not tell the junior stockholders that Joanne also sought to undo the reorganization.

In November 1994, Joanne and Grimmett filed a civil RICO action in federal court.[2] They alleged a pattern of racketeering activity having four goals: (1) to acquire and maintain Vincent's medical practice interest by fraud; (2) to acquire and maintain Dr. Hareen's medical practice interest by fraud; (3) to defraud the CAN junior stockholders; and (4) to obstruct justice. They claimed that Brown masterminded the entire scheme.

Brown and her law firm moved to dismiss Siragusa's RICO suit as barred by the four-year statute of limitations, claiming that Siragusa knew of the injury to her interest in Vincent's medical practice in May 1989 (when Siragusa filed the bankruptcy court complaint). Brown sought to invoke the "injury discovery" rule, under which a civil RICO cause of action accrues once the injury is reasonably apparent; under this theory, Siragusa's claim would be time-barred. In response, Siragusa claimed that the "injury and pattern discovery" rule applied, and that she did not discover the "pattern" of racketeering activity until December 1990 when Dr. Hareen disclosed the scope of Brown's activities. Siragusa

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[2] Since both plaintiffs filed identical briefs to this court, both will be hereafter referred to as "Siragusa."

argued in the alternative that she had suffered new injuries since November 1990 which, under the separate accrual rule, allowed her to press her claim. The district court dismissed the suit.

Siragusa moved for reconsideration on the ground that the bankruptcy proceeding had equitably tolled her RICO cause of action. She further contended that Brown's fraudulent concealment of the conspiracy tolled the limitations period. The district court addressed only the first argument and denied Siragusa's motion. Siragusa's timely appeal followed.

II.

Siragusa first argues that her civil RICO cause of action did not accrue until December 1990, when she first discovered the "pattern" of Brown's conspiracy; because the statute of limitations for a civil RICO claim is four years, *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987), she claims that her November 1994 action was timely and that the district court erred in dismissing her suit.

We review de novo the district court's dismissal on statute of limitations grounds. *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993). Because the district court has in this case considered evidence outside the pleadings, we treat Brown's motion as one for summary judgment. *See* Fed. R. Civ. P. 12(c). Thus, we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly

applied the relevant substantive law. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

The elements of a civil RICO claim are simple enough: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as "predicate acts") (5) causing injury to the plaintiff's "business or property." 18 U.S.C. §§ 1964(c), 1962(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). In the absence of guidance from the Supreme Court,[3] however, the Courts of Appeals have fashioned no less than three distinct accrual rules for civil RICO claims. The issue of which one to apply is a question of law we review de novo. *Mendez v. Ishikawajima-Harima Heavy Indus. Co.*, 52 F.3d 799, 800 (9th Cir. 1995).

The first rule, followed by the First, Second, Fourth, Fifth, and Seventh Circuits, is the "injury discovery" rule. This rule was imported from the general federal rule of accrual and has two components. First, the civil RICO limitations period "begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *see Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-68 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *La Porte Constr. Co. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992). The plaintiff need not discover that the injury is part of a "pattern of racketeering" for the period to begin

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[3] *Malley-Duff* did not reach this issue. 483 U.S. at 156-57.

to run. *McCool*, 972 F.2d at 1465. The second part of the "injury discovery" rule is the "separate accrual rule," which provides that a new cause of action accrues for each new and independent injury, even if the RICO violation causing the injury happened more than four years before. *Bankers Trust*, 859 F.2d at 1103.

The second accrual rule, followed by the Sixth, Eighth, Tenth, and Eleventh Circuits, is the "injury and pattern discovery" rule. Under this rule, the plaintiff must "discover, or be in a position to discover, the existence of a pattern of racketeering activity *in addition to* the existence . . . of the injury." *Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994) (emphasis added) (footnote omitted); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Garden Office Bldg. v. Barnette Bank*, 906 F.2d 1546, 1554 (11th Cir. 1990), *cert. denied sub nom. Barnette Banks, Inc. v. Konstand*, 500 U.S. 910 (1991). These Circuits also follow the "separate accrual rule" so that the limitations period begins to run as to each new and independent injury when the plaintiff discovers both the injury and the pattern. *Bivens*, 906 F.2d at 1554-55.

The Third Circuit follows the final rule, the "last predicate act" rule. This rule provides that:

> [T]he limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, *unless*, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or *further predicate acts occur which are part of the same pattern. In that*

> *case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity.* The last predicate act need not have resulted in injury to the plaintiff but must be part of the same "pattern."

Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988) (emphasis added).

While Siragusa concedes that she knew of her injury – the loss of her interest in Vincent's medical practice – by the time she filed her May 1989 bankruptcy complaint, she claims that she did not learn of Brown's pattern of activity until December 1990, when Dr. Hareen came forward and she learned that Brown's scheme targeted more than one victim. Because, she claims, the Ninth Circuit currently follows the "injury and pattern discovery" rule, she had until December 1994 to bring her civil RICO claim.

Unfortunately for Siragusa, we have faithfully followed the "injury discovery" rule for over a decade. *See Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990) ("The limitations period [for civil RICO actions] begins to run when a plaintiff knows or should know of the injury which is the basis for the action."); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) (holding that civil RICO claim accrues "when [the plaintiff has] actual or constructive knowledge of the fraud."); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987) ("The limitations period begins to run when a plaintiff knows or should know of the injury which is the basis for the action."); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984) (reasoning that the general rule for accrual,

plaintiff's discovery of the injury, should apply to civil RICO claims). This Circuit has also adopted the separate accrual rule. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring).

Siragusa nonetheless asks us to reconsider our prior holdings in light of the recent advent of the "injury and pattern discovery" rule, and urges us to adopt this newer rule.[4] She initially points out that RICO should be read broadly, *Sedima*, 473 U.S. at 497, and argues that the "injury and pattern discovery" rule comports with this broad reading.

Siragusa then levels three criticisms at the "injury discovery" rule, contending the rule is inconsistent with a broad reading of RICO. First, she claims that this rule has the wrong focus: Instead of focusing on the injury caused by the RICO *violation* (which requires a pattern), this rule – because it does not require discovery of a pattern – focuses solely on the injury caused by the *predicate act*. *See Granite Falls*, 924 F.2d at 154. This argument has merit, however, only if the focus of RICO *is* on the RICO violation and not on the predicate acts. RICO focuses on the predicate acts. *See Sedima*, 473 U.S. at 497 ("[T]he essence of the [RICO] violation is the commission of those [predicate] acts in connection with the conduct of an enterprise . . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the *commission of the predicate acts.*") (emphasis added).

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[4] Siragusa does not argue that the panel should adopt the "last predicate act" rule.

Siragusa next contends that the "injury discovery" rule, because it does not require a plaintiff to discover a pattern, is unfair to that plaintiff because it starts the clock ticking before she discovers all the elements of her claim. This argument rests on the assumption that a plaintiff's cause of action should not accrue until she has discovered that all elements exist. This is wrong. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (holding that Clayton Act statute of limitations period begins to run when plaintiff is injured); *United States v. Kubrick*, 444 U.S. 111, 123 (1979) (holding that the Federal Torts Claim Act statute of limitations period begins when a plaintiff discovers his injury and not when he also discovers it was negligently inflicted). Besides, a court wishing to give a plaintiff who knows of her injury time to investigate the pattern can always toll the limitations period. *See McCool*, 972 F.2d at 1465.

Siragusa finally argues that the "injury discovery" rule does not give a plaintiff sufficient time to bring suit. To prove a "pattern," she argues, a plaintiff must show (1) two predicate acts within 10 years of each other; (2) a relationship between those two acts; and (3) a threat of continued activity. See 18 U.S.C. § 1961(5); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Although a plaintiff can prove a relationship by showing that the acts "have the same or similar purposes, results, participants, victims, or methods of commission," *id.* at 240 (citing 18 U.S.C. § 3575(e)), continuity cannot usually be proven unless the scheme has been in existence for at least one year. *Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992). Because the continuity

element requires at least one year to mature, she concludes, only three years remain to bring suit. While Siragusa's exposition of the law is correct, it does not advance her argument to favor the "injury and pattern discovery" rule. Because a RICO cause of action cannot accrue until all the elements exist, *see McCool*, 972 F.2d at 1465, no statute of limitations can begin to tick until a pattern exists, which will not be until continuity exists and the one year usually required to establish continuity has already lapsed. Both accrual rules at issue here require all the elements to exist; neither will begin to tick until the one-year continuity delay has lapsed. Because this one-year delay impacts both rules equally, it favors neither.

We do not find Siragusa's criticisms persuasive enough to warrant abandonment of the "injury discovery" rule. Moreover, the "injury discovery" rule encourages diligence in RICO prosecutions and insures that evidence remains fresh. For these reasons, we reaffirm this Circuit's rule that a civil RICO cause of action arises when the plaintiff knows or should know that she has been injured.

Under this rule, the dismissal of Siragusa's RICO claim is proper. In her May 1989 complaint in bankruptcy court, Siragusa alleged that a "common plan . . . defrauded [her] out of her rights under the Divorce Instrument [i.e., her half of Vincent's medical practice interest]." Given these allegations, it is clear that Siragusa knew in May 1989 that she had suffered injury. Thus, she had until May 1993 to file her claim; because it was filed thereafter, it was properly dismissed.

III.

Siragusa next claims that, even if the injury she discovered in May 1989 is barred by the statute of limitations, she has since suffered other injuries which, under the "separate accrual rule," entitle her to recover for all her injuries.

In his concurrence in *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987), then-Judge Kennedy first applied the "separate accrual rule" in the RICO context:

> The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period. A corollary rule is that damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period.

Id. (citations omitted). For support, Judge Kennedy drew on *Gibson v. United States*, 781 F.2d 1334, 1340 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (applying rule and its corollary in a § 1983 conspiracy case) and *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1301-02 (9th Cir.), *cert. denied*, 479 U.S. 886 (1986) (applying rule and its corollary in a Sherman Act case and holding that plaintiff, a souvenir store owner, suffered new injury each time the defendant tour company shepherded tourists to its coconspirators, other souvenir shops, to drive the plaintiff out of business).

Only a few Ninth Circuit cases offer guidance for a court applying this rule. Prior to *Ammann*, the court had

rarely discussed what constituted a "new" injury. In *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68 (9th Cir.), *cert. denied sub nom. AMF, Inc. v. General Motors Corp.*, 444 U.S. 900 (1979), the plaintiff, AMF, accused car manufacturers of violating the Clayton Act because they all agreed not to purchase AMF's engine emission control devices. By 1964, every defendant had refused to buy AMF's device. When AMF's 1969 suit was dismissed for exceeding the four-year limitations period, AMF claimed it suffered a new injury because one of the car companies had refused AMF's renewed offer to deal in 1965. The court held that AMF had been excluded from the device market (and injured) in 1964 when the car manufacturers gave their "irrevocable, immutable, permanent, and final" decision; a subsequent refusal did not create a new injury. *Id.* at 72.

In *Pace Industries, Inc. v. Three Phoenix Co.*, 813 F.2d 234 (9th Cir. 1987), the Circuit drew on *Hennegan* and *Air Pollution* to further define *Ammann's* "overt act" language. It held that:

> [T]wo elements characterize an overt act which will restart the statute of limitations: 1) It must be a *new and independent act* that is not merely a reaffirmation of a previous act; and 2) It must *inflict new and accumulating injury* on the plaintiff.

Pace, 813 F.2d at 238. In *Pace*, the plaintiff Pace entered into a contract to purchase Wabash's line of multiple disc testers. The contract contained a covenant wherein Pace agreed not to compete with Three Phoenix, the company to which Wabash had sold its line of single disc testers. When Pace disregarded this agreement in 1978 and began

to market single disc testers, Three Phoenix sued for injunctive relief in state court; the case was appealed to the Arizona Supreme Court. In 1983, Pace instituted its RICO suit claiming that the Wabash-Pace agreement was part of a scheme between Wabash and Phoenix to keep Pace out of the single disc business, in violation of antitrust law. When Pace's suit was dismissed as untimely, Pace contended that Three Phoenix's filing of appeals within the four year period was an "overt act" designed to further its scheme. We disagreed, holding that Three Phoenix's appeal was not a new and independent act apart from its initial filing of the suit in 1975.

Other Circuits also use the "new and independent" language in their "separate accrual" rules, which shed additional light on how this term is interpreted. In *Bivens*, the defendants were accused of committing three sets of acts: (1) a wrongful takeover of a limited partnership in 1975; (2) the mismanagement and diversion of the partnership's assets from 1975 to 1981; and (3) the sale of the partnership's primary asset, a hotel, at below fair market value in 1981. 906 F.2d at 1549-51. The Eleventh Circuit held that the mismanagement and subsequent sale of the hotel were "new and independent" acts because they "[were] not included among the injuries that naturally flow from the wrongful takeover [in 1975]." *Id.* at 1551. In *Bankers Trust*, the corporate defendant was accused of: (1) wrongfully concealing assets during a 1974-76 bankruptcy proceeding; (2) conducting harassing lawsuits in 1978-79 to prevent the plaintiff from vacating the fraudulently attained bankruptcy plan; and (3) fraudulently conveying property in 1981. The court adopted the separate accrual rule and found that the final two injuries were

"independent" of the first. *Bankers Trust*, 859 F.2d at 1102-05.

Siragusa's primary injury is the loss of her interest in Vincent's medical practice. Because this injury appears to have been perfected upon the reorganization of the medical practices and the filing of Vincent's bankruptcy petition, it seems to have been concluded by May 1989 at the latest (when Siragusa actually knew of the injury); because that is more than four years before the filing of her November 1994 complaint, that injury would seem to be unreachable under *Ammann's* corollary rule.

Siragusa argues that this particular injury has still not been perfected – because the bankruptcy proceeding aimed at defeating her interest is not yet completed. Even if we assume that this argument has merit (which is doubtful), Siragusa fails to show any "new and independent" act inflicting a "new" injury since November 1990. In her complaint, Siragusa claims that Brown engaged in four sets of post-November 1990 acts that injured her: (1) mail fraud by submitting false documents to the Bankruptcy Court to conceal the fraud; (2) obstruction of justice by concealing documents and falsely testifying in depositions; (3) defrauding Dr. Hareen; and (4) defrauding CAN junior owners by not disclosing CAN's full liability to Siragusa. As to each of these, Siragusa claims that she has been injured due to a loss in her share of the profits from Vincent's medical practice interest.

None of the post-November 1990 acts listed above are "new and independent." To begin with, all of them

are part of the same corporate reorganization/bankruptcy scheme, and the injuries Siragusa claims are identical to those alleged prior to that time – the loss of her interest in Vincent's practice; neither the acts nor the injuries are new. These injuries are far less independent from one another than were the wrongful takeover and mismanagement of assets in *Bivens* or the false bankruptcy claim and harassing litigation in *Bankers Trust*. And although the injury may be different as to the CAN junior owners or even Dr. Hareen, Siragusa cannot claim that *their* injuries are new injuries to *her;* a RICO claim only redresses the plaintiff's injuries. *See* 18 U.S.C. § 1964(c) ("Any person injured in *his* business or property . . . may sue therefor . . . ") (emphasis added); *Pace*, 813 F.2d at 238 (holding that the statute of limitations will restart only if plaintiff shows a "new and accumulating injury *on the plaintiff*") (emphasis added). Siragusa's post-November 1990 injuries cannot therefore form the basis for a separate cause of action.

IV.

Siragusa argues that the statute of limitations on her RICO cause of action should have been tolled until December 1990, when she first learned that her injuries were part of a pattern of racketeering activity. Until that point, she contends, Brown had perjured herself in depositions and other correspondence to insure that Siragusa never learned of the pattern. Equitable tolling doctrines, including fraudulent concealment, apply in civil RICO cases. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir. 1988) ("As to the RICO claim . . . federal equitable tolling doctrines apply."); *see Volk*, 816 F.2d at 1415.

As an initial matter, Siragusa never pled the allegedly concealed facts in her complaint. Failure to plead these facts waives this tolling defense. *See Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 120 (9th Cir. 1980) ("The plaintiff must plead with particularity the circumstances surrounding the fraudulent concealment and state facts showing his due diligence in trying to uncover the facts." (citation and internal quotation omitted)); *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (failure to plead facts with particularity requires dismissal).

Siragusa's tolling arguments lose on the merits as well. The doctrine of fraudulent concealment is invoked only if the plaintiff both pleads and proves that the defendant *actively* misled her, and that she had neither actual nor constructive knowledge of the *facts constituting her cause of action* despite her due diligence. *Volk*, 816 F.2d at 1415 ("The doctrine [of fraudulent concealment] is properly invoked only if a plaintiff establishes 'affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief.' ") (citation omitted); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978); *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 120 (9th Cir. 1980); *Pocahontas*, 828 F.2d at 218-19 (noting that fraudulent concealment "implies conduct more affirmatively directed at deflecting litigation ") (emphasis added).

Siragusa's claim fails to demonstrate active concealment. She sets forth no proof of Brown's active concealment of the reorganization scheme; at most, Brown failed to "own up" to her illegal conduct. A failure to "own up" does not constitute active concealment. *Pocahontas*, 828

F.2d at 218. Furthermore, Siragusa had available all the facts necessary to discover her cause of action with due diligence. The limitations period does not toll simply because a party is ignorant of her cause of action. *Volk*, 816 F.2d at 1416; *Pocahontas*, 828 F.2d at 218.

Thus, the district court did not err when it failed to consider this meritless argument.

V.

Siragusa argues that Vincent's ongoing bankruptcy proceeding makes her RICO claim timely. She first argues that, even if her RICO cause of action accrued in May 1989, it was automatically tolled by the bankruptcy proceeding. Alternatively, she argues that her RICO action has not yet accrued because she does not yet know her damages.

A.

In her first argument, Siragusa relies on *Mt. Hood Stages Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980). In *Mt. Hood*, the Interstate Commerce Commission (ICC) permitted Greyhound to acquire a number of bus companies whose routes circled Mt. Hood on the condition that Greyhound not interfere with bus routes going through the mountain. Greyhound started to violate the condition, and one of its competitors, Mt. Hood Stages, filed a complaint with the ICC in 1964. When Mt. Hood Stages sued for antitrust violations in 1968, Greyhound moved to dismiss because the four-year limitations period had started to run in 1960. Mt.

Hood Stages contended that the ICC proceeding tolled the limitations period, and the court agreed. We reasoned that Greyhound would be immune from antitrust liability if its challenged transportation practices were necessary to effectuate the acquisitions approved by the ICC. The necessity of the practices could only be decided by the ICC as an expert body. Thus it was appropriate to toll the running of limitations on the antitrust claim until the ICC had made "a preliminary determination of issues within its primary jurisdiction." *Id.* at 405.

Subsequent cases have read *Mt. Hood* narrowly and limited its application to cases involving "considerations of federal policy and primary jurisdiction." *Pace*, 813 F.2d at 241; *Community Elec. Serv. v. National Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235, 1241 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989). In *Conley v. International Brotherhood of Elec. Workers*, 810 F.2d 913 (9th Cir. 1987), the plaintiff filed a petition with the National Labor Relations Board and then brought a court action stating similar claims of unfair labor practices, violations of the Labor-Management Relations Act, and violations of state law. The court read *Mt. Hood* to say that "[e]quitable tolling is most appropriate when the plaintiff is required to avail himself of an alternative course of action as a precondition to filing suit." *Id.* at 915. In that case, the NLRB suit was merely a "parallel avenue[ ] of relief" to the court action. *Id.* at 916. Thus, we refused to toll the period while the NLRB had considered the plaintiff's petition. *See also Community Electric*, 869 F.2d at 1241 (refusing to toll statute of limitations for period in which plaintiff sought relief from NLRB because prior resort to the NLRB "was not a prerequisite to review in federal court"); *Pace*, 813

F.2d at 240 ("Prior judicial actions, however, 'do not toll the statute of limitations, no matter how close their relationship to the one at bar.' ") (citation omitted).

Given this interpretation of *Mt. Hood*, Siragusa's claim fails. Unlike the ICC's jurisdiction over immunity claims, the primary jurisdiction of the bankruptcy court is not RICO claims. With respect to RICO claims, the bankruptcy court and federal court are more properly considered "parallel avenues of relief." Even if Siragusa could have raised her RICO claim in some form in the bankruptcy proceeding, *see In re The Monetary Group*, 2 F.3d 1098, 1099 (11th Cir. 1993), she could have simultaneously pressed her claim in federal court since the automatic stay did not apply to her claim against Brown, who was not the debtor, *see* 11 U.S.C. § 362(a); *In re Kalispell Feed & Grain Supply*, 55 B.R. 627, 629 (Bankr. D. Mont. 1985). Thus, the bankruptcy proceeding did not toll her RICO claim.

B.

Siragusa's alternative argument requires more consideration. She argues that the conclusion of the bankruptcy proceeding *is* a prerequisite to her RICO claim. Because the bankruptcy court may award her all her damages and thereby remove all her injury, she has not yet definitively suffered injury and therefore lacks an element of her RICO cause of action. Thus, she argues, her claim has not yet accrued and could not be barred by the statute of limitations.

The seed of this discussion is a 1971 Supreme Court case, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S.

321 (1971). In that case, Zenith sued Hazeltine for Sherman and Clayton Act violations arising from Hazeltine's participation in Canadian, English, and Australian patent pools. Zenith sought future damages to its market share due to Hazeltine's wrongful behavior. The Court applied the separate accrual rule to each of Zenith's injuries, and noted that in most cases, future damages could be awarded. It also observed that "it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." *Id.* at 339. The Court concluded that the cause of action for future lost profits would accrue as those damages were incurred: "In antitrust and treble-damages actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered." *Id.*

A line of cases in the Second Circuit has seized on this language and construed it broadly. In *Bankers Trust*, the Circuit held that a RICO plaintiff's cause of action had not yet accrued. At the time of the federal suit, the plaintiff was attempting to regain some of the defendant's assets in an ongoing bankruptcy proceeding. The court noted that the plaintiff might recover all his damages in the ongoing bankruptcy proceeding, so that the amount of the plaintiff's damages was speculative. Relying on *Zenith*, it concluded that his RICO cause of action had not yet accrued. *Bankers Trust*, 859 F.2d at 1105-06. *See also Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1165 (2d Cir.), *cert. denied*, 114 S.Ct. 385 (1993) (holding

that a RICO claim had not accrued for a plaintiff who, because he had not collected on judgments awarded in earlier state proceedings, did not know the amount of his damages); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 728 (1995) ("[A]s a general rule, a cause of action does not accrue under RICO until the amount of damages becomes clear and definite."). *Accord Barnett v. Stern*, 909 F.2d 973, 977 n.4 (7th Cir. 1990) (in dicta, adopting *Bankers Trust* rule under facts similar to those in *Bankers Trust*); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847-48 (1st Cir. 1990) (adopting *Bankers Trust* rule for federal RICO claim where plaintiff has yet to win or collect judgment on state court action for his injury).

Siragusa argues that the facts of this case are nearly identical to those in *Bankers Trust:* She cannot know the amount of her damages until Vincent's bankruptcy proceeding has finished. If *Bankers Trust* were the law in the Ninth Circuit, Siragusa would be correct.

However, we have interpreted *Zenith* much more narrowly. In *Air Pollution*, we noted the limits of the *Zenith* decision:

> *Zenith* did not establish new standards for determining whether damages are ascertainable as of a particular date. . . . In *Bigelow* [*v. RKO Pictures, Inc.*, 327 U.S. 251 (1946)] and *Story Parchment Co.* [*v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)], the Court faced the question whether damages were too uncertain for a jury to award damages. It is distinguished [sic] uncertain *damage*, which prevented recovery, from an uncertain *extent* of damage, which did not prevent recovery; that is, the failure to establish an

> injury, from the not uncommon imprecision with regard to its scope.

Air Pollution, 591 F.2d at 73; *see also Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 650 (9th Cir. 1988); *Pace*, 813 F.2d at 240; *Volk*, 816 F.2d at 1415 ("Damages recoverable under RICO, therefore, do not affect accrual of the cause of action or commencement of the limitations period."). Thus, "[t]he question of whether there is a right to recovery is not to be confused with the difficulty in ascertaining the scope or extent of the injury." *Pace*, 813 F.2d at 240. This directly conflicts with the Second Circuit's "clear and definite damages" rule.

Precedent aside, we disagree with the Second Circuit's interpretation of *Zenith*. *Zenith* dealt with lost future profits, which cannot be calculated until they are incurred – the uncertainty arose because future market conditions, upon which damages depended, had yet to unfold. In *Bankers Trust*, however, the RICO plaintiff had sustained a definable injury – the uncertainty in that case involved whether and to what extent the known injury would be mitigated by a bankruptcy court. In one, the injury is speculative because it is not known whether it will occur at all; in the other, the injury has occurred and is known, but it is speculative whether the damages might be reduced or even eliminated by alternative recovery efforts. We believe it would be error to equate the two.

In this Circuit, Siragusa's claim fails. She knew the value of her injury – the loss of her share of Vincent's medical practice interest – at the time she filed her bankruptcy complaint. That she might have been able to

recoup some of those damages in the bankruptcy proceeding did not preclude her from bringing her RICO action. We need not decide here whether subrogation or other devices would apply to prevent double recovery. It is enough to hold, as we do, that under *Pace* and *Volk* and *Air Pollution* and *Mir*, her RICO claim had accrued at the time she filed her adversary complaint.

VI.

For the foregoing reasons, the district court's dismissal of Siragusa's civil RICO claims is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

TOM GRIMMETT as Trustee for the Bankruptcy Estate of Vincent Siragusa and JOANNE M. SIRAGUSA, Plaintiffs, v. PATRICIA L. BROWN; PATRICIA L. BROWN, LIMITED, a Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD., a Nevada Corporation; and DOES 1 through 100, Defendants.	CV-S-93-1155-PMP (RJJ) ORDER (Filed Mar. 14, 1994)

Before the Court is a Motion to Dismiss (# 5) filed by Defendants Patricia L. Brown ("Brown") and Patricia L. Brown, Limited, on January 3, 1994, and an Errata (# 6) also filed on January 3, 1994. Plaintiffs Tom Grimmett as Trustee for the Bankruptcy Estate of Vincent Siragusa ("Trustee") and Joanne Siragusa ("Joanne") filed their Opposition (# 12) on January 31, 1994, and a Supplemental Opposition (# 17) on March 1, 1994. Defendants filed their Reply (# 18) on March 8, 1994.

In considering Defendants' Motion to Dismiss, the factual allegations of Plaintiffs' Complaint must be presumed to be true, and this Court must draw all reasonable inferences in favor of Plaintiffs. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The issue is not whether Plaintiffs will ultimately prevail, but whether they are entitled to offer evidence in support of their claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Consequently, the Court may not grant a Motion to Dismiss for failure to state a claim "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (Court will affirm dismissal of a complaint only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations"). The Court does not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in Plaintiffs' Complaint. *Western Mining Council v. Watts*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

On September 23, 1983, Joanne and Vincent Siragusa entered into a property settlement agreement in the process of getting divorced. The Complaint (# 1) alleges that all of the Siragusas' assets were community property, and further alleges that substantially all of the value of these marital assets were contained in Vincent Siragusa's ("Vincent") medical practice interest.[1] As part of the property

[1] As is explained *infra*, Vincent had his own cardiology practice, and had a one-third interest in two other medical

settlement, Joanne promised to release her one-half community property interest in Vincent's medical practice interest in exchange for certain periodic "marital payments," with the understanding that Joanne would have a lien against his medical practice interest to secure the marital payments and other obligations under the divorce decree. On February 29, 1984, Joanne and Vincent executed a Security Agreement and UCC-1 filing, and these documents were duly recorded on March 5, 1984.

The Complaint (# 1) alleges that Vincent had his own cardiac medical practice, known as Vincent Siragusa, Ltd. It also alleged that Vincent had a one-third interest in Heart Institute of Nevada, known by its acronym "HIN." Along with Vincent, Dr. Paul Heeren ("Heeren") and Dr. John A. Bowers ("Bowers") each owned one-third of HIN.[2] Additionally, Vincent, Heeren, and Bowers owned one-third equal shares in Heart Institute Cath Lab, known by its acronym "HICL."[3] Finally, the Complaint alleges that Vincent had a 27.55% interest in Heart Institute Property, or "HIP,"[4] and that Heeren and Bowers also had a

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groups. For present purposes, Vincent's interest in all three practices is referred to as his "medical practice interest."

[2] The respective doctors' interest in the various medical practices is sometimes referred to as their "medical practice interest."

[3] Plaintiffs allege that HICL leased medical equipment to HIN.

[4] Plaintiffs allege that HIP owned real property, and leased said property to HIN.

27.55% share, with the remainder of HIP owned by HIN doctor-employees.[5]

Generally, Plaintiffs allege that in or around November, 1986, Defendants began to implement a plan to divest Joanne of her interest in Vincent's medical practice. Specifically, Plaintiffs allege that the Defendants devised and implemented four schemes to fraudulently deprive Joanne and the Trustee of interests rightfully belonging to Plaintiffs. Plaintiffs describe these schemes as (1) a scheme to fraudulently acquire and maintain Siragusa's medical practice interest, (2) a scheme to fraudulently acquire and maintain Heeren's medical practice interest, (3) a scheme to defraud the CAN junior stockholders, and (4) a scheme to obstruct justice. According to Plaintiffs, the goal of each scheme was to impair the rights of both Joanne and the Trustee in Vincent's medical practice interest.

Although the details are somewhat confusing, Plaintiffs allege that Defendants undertook a fraudulent reorganization of the medical practices in order to divest Vincent of his interest in his medical practices, for which Vincent was paid little or no consideration. Thereafter, Vincent became a mere employee of HIN. Plaintiffs also

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[5] Plaintiffs also allege that Bowers owned Cardiology Associates of Nevada, known by its acronym "CAN." Plaintiffs further allege that sometime in April, 1990, Bowers sold 37.5% of CAN's common stock to CAN doctor-employees, and that he continued to sell some of CAN's common stock to CAN doctor employees, sometimes referred to as the "CAN junior associates," through November, 1991.

Also, CAN, HIP, HIN, and HICL shall be referred to as the "medical practices."

allege that Vincent filed a fraudulent bankruptcy under Chapter 7, in which he represented both that he was unable to pay Joanne the agreed upon payments detailed in the divorce decree, and that he had no equity left in his medical practice. The Complaint further alleges that this reorganization was accomplished in order to destroy Joanne's interest in Vincent's medical practice interest. Plaintiffs allege that the Heeren scheme, the CAN stock scheme, and the scheme to obstruct justice were also part of the plan to defraud Joanne of her interest in Vincent's medical practice interest.

Plaintiffs allege the following federal law violations as predicate acts: bankruptcy fraud under 18 U.S.C. § 152, mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1343, obstruction of justice under 18 U.S.C. § 1503, and fraud in the sale of securities under various securities laws. The Complaint also alleges several state law violations, including grand larceny, embezzlement, obtaining money by false pretenses, perjury or subornation of perjury, offering false evidence, and securities fraud.

Defendants move to dismiss the Complaint, asserting that the Complaint fails to state Federal RICO claims, and that in the absence of cognizable federal claims, this court has no jurisdiction to decide the state law claims asserted in the Complaint.

Defendants assert that the Federal RICO allegations are barred by the statute of limitations. Defendants argue that the statute of limitations for RICO claims has run, as Plaintiffs knew or should have reasonably known of their injuries in May, 1989, and that the Complaint was filed

more than four years later, in November, 1993. Plaintiffs argue that they only discovered the role of Defendant Brown in the alleged racketeering activity in December, 1990, when "Heeren came forward with the truth of Brown's involvement." *Plaintiffs' Opposition* (# 12) at 15; *see also* Complaint (# 1) at 21 (alleging that "the fraudulent nature of the Reorganization activities by Defendants Brown and Beckley and the Participants are candidly described . . . in Heeren's December 28, 1990 Affidavit Re Reorganization" and in the related deposition testimony of Heeren and Heeren's wife).

The statute of limitations for Federal civil RICO actions is four years. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274 (9th Cir. 1988). In this case, the dispute centers around when the four years begins to run. Plaintiffs argue that the statute of limitations should not begin to run until a plaintiff knows of his injury and of its source. This, however, clearly is not the rule in the Ninth Circuit. In this Circuit, RICO's four year statute of limitations begins to accrue to when a plaintiff "knows or should know of the injury which is the basis for the action." *Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990). Knowledge regarding the source of one's injury is not a factor for statute of limitations purposes.

Defendants urge this Court to dismiss because they argue that Plaintiffs knew of their injury in May, 1989. Defendants point to the May 2, 1989, date in which Plaintiffs filed an action in an adversary proceeding in Vincent's bankruptcy alleging fraudulent reorganization.

Defendants argue that the complaint filed in that adversary proceeding (Adv. No. S-890068) demonstrates that Plaintiffs actually were aware of their injuries caused by the allegedly fraudulent reorganization of the medical entities as of the date that complaint was filed.

The Court has independently reviewed the complaint filed in Plaintiffs' adversary proceeding. The allegations contained in that complaint make it clear that Plaintiffs were aware that they had suffered an injury from the allegedly fraudulent reorganization of the medical entities. The injury alleged in that complaint was that Joanne and the Trustee had been defrauded out of their interest in Vincent's medical practice interest. This is the same injury which is the subject of the present Complaint.[6] Furthermore, the complaint in the adversary proceeding not only demonstrates that Plaintiffs were aware that they had been injured, but also indicates that Plaintiffs knew many of the underlying facts which gave rise to their injury. Thus, the Court finds as a matter of law that Plaintiffs' cause of action accrued no later than May 2, 1989, the date on which Plaintiffs filed their complaint in the adversary proceeding.

Plaintiffs argue that even if May 2, 1989, is the date of accrual, Defendants continued to commit racketeering

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[6] The Court recognizes that when Plaintiffs filed their Adversary Proceeding complaint, they may not have been aware, as they allege now, that Defendant Brown was involved in any allegedly fraudulent activity. Nevertheless, the rule in this Circuit focuses on when a plaintiff knew or should have known of his injury, and not when that plaintiff knew or should have known that a particular person caused that injury.

violations well after that date, and thus, suit on those violations should not be precluded. Plaintiffs seem to be arguing that a cause of action does not accrue until a plaintiff knows or should have known of the last predicate act which is part of the same pattern of racketeering activity. Although this is the rule in the Third Circuit, *see Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988), it is not recognized by the majority of courts, and in fact, is not the rule in the Ninth Circuit. The majority of courts hold that the statute of limitations begins to run when the plaintiff knew or should have known of his injury, regardless of whether the pattern of related racketeering activity continued. *See, e.g., Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-67 (1st Cir. 1990) (containing a list of citations);[7] *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102-03 (2d Cir. 1988).[8]

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[7] Analysis found in *Rodriguez* is especially applicable to the case at bar. The *Rodriguez* court explained that to permit a cause of action to accrue on the date of the last predicate act which is part of the same pattern of racketeering activity would be to extend the possible limitations period beyond all reason. *Rodriguez*, 917 F.2d at 667.

[8] The rule of "separate accrual" does not aid Plaintiffs. This rule states that for each injury caused by a RICO violation, the limitations period accrues, for that injury, when the plaintiff knew or should have known of the injury. *See State Farm Mutual Automobile Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J. concurring); *Madariaga*, 851 F.2d at 275; *Bankers Trust Co.*, 859 F.2d at 1103; *Levin-Richmond Terminal Corp. v. Local 10*, 751 F. Supp. 1373, 1376 (N.D. Cal. 1990). The rule of separate accrual applies to additional, independent injuries that may result from the same RICO violations. *Bankers Trust Co.*, 859 F.2d at 1103. Here, although Plaintiffs allege that Defendants continued to engage in RICO violations well after May, 1989,

Therefore, this Court finds that because Plaintiffs knew of their injury no later than May, 1989, and because they filed the present action on November 24, 1993, more than four years after the date of accrual, Plaintiffs' RICO claims are barred by the statute of limitations. Plaintiffs' federal RICO claims provide the sole basis for this Court's jurisdiction. Thus, without those claims, the pendent state law claims should also be dismissed. *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985); *Jones v. Community Redevelopment Agency*, 733 F.2d 646 (9th Cir. 1984); *Copeland v. Desert Inn Hotel*, 673 P.2d 490, 492 (Nev. 1984).

IT IS THEREFORE ORDERED THAT Defendants' Motion to Dismiss (# 5) is granted.

DATED: March 14, 1994

/s/ Philip M. Pro
PHILIP M. PRO
United States
District Judge

Plaintiffs do not allege a separate or independent injury resulting from the continued acts. Rather, Plaintiffs allege one continuing pattern of racketeering activity which injured their claim to Vincent's medical practice interest.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

TOM GRIMMETT as Trustee for the Bankruptcy Estate of Vincent Siragusa and JOANNE M. SIRAGUSA, Plaintiffs, v. PATRICIA L. BROWN; PATRICIA L. BROWN, LIMITED, a Nevada Corporation; BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD., a Nevada Corporation; and DOES 1 through 100, Defendants.	CV-S-93-1155-PMP (RJJ) ORDER (Filed June 1, 1994)

Before the Court is a Motion to Reconsider Order Dismissing Claims Against Patricia Brown on Statute of Limitations Grounds (# 22), filed by Plaintiffs Tom Grimmett as Trustee for the Bankruptcy Estate of Vincent Siragusa ("Trustee") and Joanne Siragusa ("Joanne") on March 18, 1994 (Dismissal Order at # 19). Defendants Beckley, Singleton, Delanoy, Jemison & List, Chtd. ("Beckley Singleton") filed its Opposition (# 23) on March 25, 1994, and Defendants Patricia L. Brown and Patricia L. Brown, Limited (hereinafter collectively referred to as "Brown"), filed an Opposition (# 27) on April 5, 1994.

Plaintiffs filed their Reply (# 30) on April 13, 1994. The Court heard oral argument on the Motion to Reconsider (# 22) on May 26, 1994.

Plaintiffs' Motion for Reconsideration asks this Court to rule specifically on the issue of whether this Court should apply the doctrine of equitable tolling, to prevent the statute of limitations from barring Plaintiffs' suit. The facts of this case are set forth in this Court's March 18 Dismissal Order (# 19).

Plaintiffs assert that *Emrich v. Touch Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988), and *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980), support their position that the Court should equitably toll the statute of limitations on their RICO action.

The parties disagree as to the proper interpretation of *Emrich*. The court in *Emrich* noted that where a federal district court applies a state statute of limitations, the court must also apply that state's equitable exceptions. *Emrich* noted further that where the applicable statute of limitations is derived from federal law, "federal equitable tolling doctrines apply." *Emrich*, 846 F.2d at 1199.

Plaintiffs argue that *Emrich* demands, at the very least, that this Court deny Defendants' Motion to Dismiss because they assert that outstanding factual issues must be resolved in the process of applying the federal equitable tolling doctrine. Although it is true that the *Emrich* court remanded that case to the district court to let the district court "resolve certain disputed factual matters," *Emrich*, 846 F.2d at 1199, the *Emrich* court never specified what factual matters the district court in that case had to

decide when considering the equitable tolling issue. Thus, the Court finds that *Emrich*, standing alone, does not compel this Court to reverse itself and deny Defendants' Motion to Dismiss. Instead, the Court must determine, as the district court in *Emrich* was commanded to do, whether the federal equitable tolling doctrine should be applied to toll the four year RICO statute of limitations in this case.

To support their argument that equitable tolling should be applied to their RICO claim, Plaintiffs point to *Mt. Hood*. Plaintiffs contend that where there are two statutory schemes (here, bankruptcy and RICO) that are dependent upon one another, a proceeding under one scheme tolls a proceeding under the other. Thus, Plaintiffs assert that their Adversary Proceeding in the Bankruptcy Court should toll any RICO claims that the statute of limitations might otherwise force them to bring.

Community Elec. Service v. National Elec. Contr., 869 F.2d 1235, 1241 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989), provides a good summary of the facts of *Mt. Hood*. "Mt. Hood, a bus company, asked the Interstate Commerce Commission to modify its approval on acquisitions by Greyhound, a competitor. Mt. Hood later filed an antitrust suit against Greyhound. Greyhound would have argued that the acquisitions were immune had Mt. Hood sued before the ICC made the modification requested. We decided that the doctrine of primary jurisdiction provides the 'relevant federal procedural law to guide the decision to toll the limitations period.' This follows because the court could issue no injunction and award no damages until the ICC exercised its primary jurisdiction." (citations omitted).

Mt. Hood stands for the general proposition that "equitable tolling is most appropriate when the plaintiff is required to avail himself of an alternate course of action as a precondition to filing suit." *Conley v. International Bro. of Elec. Workers*, 810 F.2d 913, 915 (9th Cir. 1987) (citing *Mt. Hood*). *Mt. Hood* has been applied more specifically to circumstances in which "an administrative agency decide[d] determinative issues within its primary jurisdiction." *Pace Indust., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 241 (9th Cir. 1987); *see also Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983) ("In this circuit, the general rule is that if prior resort to an administrative body is a prerequisite to review in court, the running of the limitation will be tolled during the administrative proceeding") (citing *Mt. Hood*).

Thus, the question becomes whether the Bankruptcy Court, in an exercise of its primary jurisdiction, had to first decide "determinative issues" before this Court could hear Plaintiffs' RICO claim. This question is suggested by *Mt. Hood*, because in that case, the court held that where another tribunal was vested with the primary responsibility for making a decision that would determine the outcome of the proceeding, the statute of limitations on the proceeding would be tolled while the parties pursued their rights in front of the other tribunal.

This question is also suggested by *Bankers Trust Company v. Rhoades*, 859 F.2d 1096 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989). That case held, *inter alia*, that the creditor plaintiff's RICO action was tolled during the debtor's bankruptcy action. This holding, however, was based not upon equitable tolling grounds, but rather on the Second Circuit's interpretation of when a RICO action

accrues. The question presented in this case appears to be whether there are any issues that must first be determined by the Bankruptcy Court before Plaintiffs could assert their RICO action. This may take the form either of a primary jurisdiction issue, as in *Mt. Hood*, or the form of an accrual question, as in *Bankers Trust*.

In this case, there appears to be no determination of the type discussed in *Mt. Hood* that is committed to the primary jurisdiction of the Bankruptcy Court which would prevent this Court from proceeding with Plaintiffs' RICO claim. Even with the automatic stay that is imposed in bankruptcy cases, one party could move to lift that stay. Furthermore, there is no indication that the Plaintiffs could not assert their RICO claim in the adversary proceeding, although it would be subject to a motion to sever. *See, e.g., Barnett v. Securities Group*, 2 F.3d 1098, 1099 (11th Cir. 1993) (RICO claim brought in an adversary proceeding). In short, the Court finds that *Mt. Hood* does not provide the basis upon which to apply equitable estoppel and toll the statute of limitations.

Additionally, this Court finds the rationale behind the holding of *Bankers Trust* to be unpersuasive, and thus chooses not to apply *Bankers Trust* to the present case. Bankers Trust was a creditor in the bankruptcy case of a debtor corporation, and was also the plaintiff seeking to bring a RICO claim against those accused of fraudulently reorganizing the corporation and rendering the corporation bankrupt. In *Bankers Trust*, the court held that any damages that Bankers Trust suffered as a result of the alleged fraudulent reorganization of the debtor corporation might be offset by whatever fraudulently transferred assets the trustee in bankruptcy could recover. Thus, the

Bankers Trust court noted that until the bankruptcy court determined what the trustee in bankruptcy could recover, Bankers Trust's damages were speculative and their amount unprovable. The court reasoned that because a RICO action does not accrue until the plaintiff knows or should know of the damages resulting from the RICO injury, Bankers Trust's RICO claim had not accrued, and would not accrue until such time as the amount recovered by the bankruptcy trustee were determined, so that Bankers Trust's damages could be determined.

In concluding that Bankers Trust injury was speculative and unprovable until it was determined how much the trustee in bankruptcy would recover, the *Bankers Trust* court relied heavily on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

Zenith was a case in which the Supreme Court considered when a claim for future profits accrued under the federal antitrust act. The Court noted that "if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date." *Zenith Radio Corp.*, 401 U.S. at 339. On the other hand, the Court stated that "even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature

unprovable."[1] *Id.* The Supreme Court concluded by stating that "in antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered." *Zenith Radio Corp.*, 401 U.S. at 339.

In sum, the Court in *Zenith Radio Corp.* was concerned with the issue of whether to allow purely speculative proof of loss of future profits. Concluding that such speculation was not admissible, the Court held that such a cause of action does not even accrue until the damages are ascertainable.

As noted by several courts, *Zenith Radio Corp.* did not change the standard for determining whether damages are speculative. *See, e.g., Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 650 (9th Cir. 1988); *Pace Industries*, 813 F.2d at 240. Those courts also noted that:

> uncertain damages, which prevent recovery, are distinguishable from uncertain extent of damage, which does not prevent recovery. The former denotes failure to establish an injury, while the latter denotes imprecision with regard to the scope or extent of the injury. The question of whether there is a right to recovery is not to be confused with the difficulty in ascertaining the scope or extent of the injury.

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[1] The Second Circuit in *Bankers Trust* seized upon this latter language, to support its conclusion that Bankers Trust's injury was "unprovable" until it was determined what the trustee in bankruptcy could recover. *Bankers Trust*, 859 F.2d at 1106.

Pace Industries, 813 F.2d at 240 (internal citations omitted); *Mir*, 844 F.2d at 650 (citing *Pace Industries*).

In the present case, the amount of damages that would "place the Plaintiff in the same financial position [s]he would have occupied absent the illegal conduct," *Bankers Trust*, 859 F.2d at 1106, were determinable at the time Plaintiffs filed their Adversary Complaint, which contained allegations virtually identical to those contained in their present RICO Complaint. That is, Joanne Siragusa's claim to half of Vincent Siragusa's interest in his various medical practices was ascertainable when Plaintiffs filed their Adversary Proceeding, because the value of Vincent's interest in his medical practices before such interest was allegedly fraudulently concealed was quantifiable.

Plaintiffs' position fails to follow *Pace*'s instruction to distinguish between damages which themselves are uncertain, and damages whose *extent* is uncertain. *Pace*, 813 F.2d at 240. Although it may be true, as pointed out by the *Bankers Trust* court, that Plaintiffs' exact damages will not be known until it is determined what the trustee in bankruptcy recovers, the existence of said damages was both knowable and provable as of the date on which Plaintiffs filed their Adversary Proceeding. All that would remain, should Plaintiffs prove their RICO case, would be to determine exactly how much Plaintiffs should recover, a figure that ostensibly would be offset by an amount recovered by the trustee in bankruptcy, and thus recoverable by Plaintiffs.

The Court therefore finds that the statute of limitations should not be tolled in this case. Neither the doctrine of equitable estoppel nor the rule of accrual supports Plaintiffs' position. Plaintiffs should have either filed their RICO claim in their Adversary Proceeding, or in a separate action in 1987.

IT IS THEREFORE ORDERED THAT Plaintiffs' Motion to Reconsider Order Dismissing Claims Against Patricia Brown on Statute of Limitations Grounds (# 22) is denied.

IT IS FURTHER ORDERED THAT the Motion to Dismiss (# 20) filed by Defendant Beckley, Singleton, Delanoy, Jemison & List, Chtd. is granted.

DATED: June 1, 1994

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge